STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN F ERVIN TESTIMENTARY TRUST.

JANE PEARSON EVANS a/k/a MARY JANE PEARSON EVANS,

Petitioner-Appellant,

v

BANK ONE TRUST CO. NA,

Respondent-Appellee,

and

ERVIN INDUSTRIES, INC., JOHN PEARSON, NANCY P. RUDOLPH, and ANN E. JORGENSON,

Appellees.

UNPUBLISHED
February 24, 2005

No. 249974
Washtenaw County Circuit Court
LC No. 02-000932-AV

In re JOHN F ERVIN TESTIMENTARY TRUST.

MARY JANE PEARSON EVANS,

Petitioner-Appellant,

v

BANK ONE TRUST CO. NA,

Respondent-Appellee,

and

ERVIN INDUSTRIES, INC., JOHN PEARSON,

No. 253745
Washtenaw County Probate Court
LC No. 61-447121-TT

NANCY P. RUDOLPH, ANN E. JORGENSON, and MARY ERVIN PEARSON,

Appellees.

In re JOHN F ERVIN TESTIMENTARY TRUST.

MARY JANE PEARSON EVANS,

Petitioner,

and

ANDREA EVANS,

Petitioner-Appellant,

v

BANK ONE TRUST CO. NA,

Respondent-Appellee,

and

ERVIN INDUSTRIES, INC., JOHN PEARSON, NANCY P. RUDOLPH, and ANN E. JORGENSON,

Appellees.

No. 253824
Washtenaw County Probate Court
LC No. 61-447121-TT

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

In Docket No. 249974, petitioner Jane Pearson Evans, also known as Mary Jane Pearson Evans, (Petitioner) appeals by leave granted an order of the circuit court that reversed the probate court's decision not to disqualify petitioner's counsel. In Docket No. 253745, petitioner appeals by right two orders denying her motion for partial summary disposition and granting respondent's (the bank) motion for summary disposition. In Docket No. 253824, petitioner Andrea Evans (Andrea), petitioner's daughter, appeals by right the orders appealed by petitioner in Docket No. 253745. The appeals have been consolidated on appeal. We affirm.

Interested party Ervin, whose voting shares are held in trust by the bank, and interested parties Pearson, Nancy Pearson Rodolph, Anne Jorgenson, and Mary Ervin Pearson, beneficiaries of five of the trusts, have filed briefs on appeal. The State Bar of Michigan Probate and Estate Planning Section was granted leave to file an amicus brief with respect to Docket No. 249974. This case arose when petitioner became unhappy with her brother John Pearson's management of Ervin Industries, Inc. (Ervin), the bank's supervision of Ervin's management, and the bank's management of the six trusts.

Petitioner first argues that the circuit court erred in disqualifying her attorney on conflict of interest grounds.[1] We disagree.

As an initial matter, plaintiff argues that the court did not have the power to disqualify her attorney. Michigan Rules of Professional Conduct are judicially enforceable. *Evans & Luptak v Lizza,* 251 Mich App 187, 194; 650 NW2d 364 (2002). It is the judiciary's exclusive constitutional prerogative under Const 1963, art 3, § 2, to define and regulate the practice of law with respect to judicial proceedings, and the power to regulate and discipline members of the state bar constitutionally belongs to our Supreme Court pursuant to Const 1963, art 6, § 5. *Attorney Gen v Public Service Comm,* 243 Mich App 487, 491; 625 NW2d 16 (2000). Moreover, "'[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.'" *Evans, supra* at 200, quoting Michigan Code of Judicial Conduct Canon 3(B)(3). Therefore, the court had the power to disqualify plaintiff's attorney on conflict of interest grounds. "The application of 'ethical norms' to a decision whether to disqualify counsel is reviewed de novo." *Rymal v Baergen,* 262 Mich App 274, 317; 686 NW2d 241 (2004), citing *General Mill Supply Co v SCA Services, Inc,* 697 F2d 704, 711 (CA 6, 1982). With respect to conflict of interest, MRPC 1.7(a) states:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless*:*
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

The plain language of the rule does not indicate, as the circuit court found, that disqualification is automatic when a conflict exists. Instead, there are numerous variables that must be considered. For example, the parties' interest must be directly adverse, counsel may reasonably believe that

[1] Petitioner argues that Bank One Trust Company was not the proper trustee in the instant suit. Although the probate court later indicated that Bank One Trust Company was the proper trustee when it denied petitioner's motion to remove Bank One Trust Company, we analyzed this issue as though the trustee were Bank One because of petitioner's claim that she has appealed the probate court's decision. Nevertheless, if the proper trustee is Bank One Trust Company, the bank's case is even stronger because petitioner's argument with respect to separate legal entities would fail.

neither attorney-client relationship will be affected, or the client may consent. Thus, we find that a case-by-case analysis is required with respect to disqualification proceedings pursuant to MRPC 1.7(a), and provide the following analysis to be conducted before an attorney is disqualified: (1) the court should determine whether a conflict exists, (2) if a conflict exists, the court should determine whether it is directly adverse, (3) if the conflict is directly adverse, representation is prohibited unless (a) the attorney reasonably believes the dual representation will not adversely affect the attorney-client relationship with either client, and (b) both clients consent after consultation.

A trial court's determination whether a conflict of interest exists is reviewed for clear error. *Rymal, supra* at 316. A conflict of interest is defined in relevant part as a "real or seeming incompatibility between the interests of two of a lawyer's clients." Black's Law Dictionary (8th ed). Here, a fee agreement signed by a representative of Berry Moorman – but not by a representative of the bank – specifically incorporated the bank's guidelines for outside counsel. The bank's guidelines for outside counsel stated in relevant part that "[a]ll of Bank One's subsidiaries and affiliates should be treated as clients for the purposes of [MRPC] 1.7," and that waivers would not be extended to matters of litigation or adversarial representation.

Although the agreement was not signed by the bank, an acceptance of an offer "'arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose.'" *In re Costs and Attorney Fees,* 250 Mich App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v Gerrish Twp,* 205 Mich App 25, 45; 517 NW2d 756 (1994), aff'd in part and remanded in part on other grounds sub nom *Kraus v Dep't of Commerce,* 451 Mich 420 (1996). The bank's retention of the firm indicated an unequivocal act of acceptance of the firm's offer to be bound by the bank's guidelines for outside counsel; thus, a contract regarding representation existed, which contained the guidelines for outside counsel, and the firm could not later deny the contract's existence. Therefore, the firm was bound by its agreement that representation of one affiliate constituted representation of Bank One, and dual representation of Bank One and plaintiff constituted a conflict of interest.[2] The probate court's conclusion that a conflict existed, and the circuit court's treatment of the issue as though a conflict existed, were not clearly erroneous. *Rymal, supra* at 316.

[2] *Pennwalt Corp v Plough, Inc,* 85 FRD 264 (D Del, 1980), cited by petitioner as the leading case for the proposition that an attorney who represents a corporation in an unrelated matter is not disqualified from representing an adversary of the corporation's affiliate, was not accurately portrayed. Although the court found that disqualification in the case against the affiliate was not required, *id.* at 274, this was after the firm's motion to withdraw from representing the corporation had been granted on the ground that if it were not permitted to withdraw a conflict would arise, *id.* at 268, 272. The court acknowledged that choosing to represent the more favored client in a conflict situation was expressly disfavored, but found that no current conflict existed at the time of withdrawal because the corporations had recently become affiliated without the knowledge of counsel, and the in-house legal departments of the two corporations had not yet merged. *Id.* at 266, 272.

The probate court found that the law firm engaged in representation that was directly adverse, stating "[when a law firm represents two parties, especially where one is suing the other, it follows then that the representations are directly adverse." The circuit court also indicated that the interests of the parties were directly adverse. "Directly" is defined as exactly or precisely, while "adverse" is relevantly defined as antagonistic or "opposing one's interests." *Random House Webster's College Dictionary* (2001). Clients' interests are directly adverse when one client sues another client. See *Rymal, supra* at 320-321; *Barkley v Detroit*, 204 Mich App 194, 203-204, 209; 514 NW2d 242 (1994). Nevertheless, petitioner claims that representation of a bank in its corporate capacity is different from representation of the bank in its fiduciary capacity, and that the proposed revision of MRPC 1.7 recognizes this distinction. The changes to MRPC 1.7 are merely proposed changes that have not been enacted. It would not be wise for this Court to decide a case according to changes that may never occur. Moreover, petitioner does not cite the language of the MRPC 1.7 itself, but the commentary to the rule. "The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule." MRPC 1.0(c). Thus, petitioner's reliance on the proposed changes to the comment to MRPC 1.7 is unfounded.[3]

The bank cites *Harrison v Fisons Corp*, 819 F Supp 1039 (MD Fla, 1993), for the proposition that a law firm may not sue a bank in its fiduciary capacity when it represents the bank in other matters. The court in that case noted, "Because [the bank] has fiduciary responsibilities [as the guardian of the minor's estate] and has its own commercial interest in management of the property of its ward, it is more than a nominal party." *Harrison, supra,* 819 F Supp at 1040. The court, citing Florida's equivalent to MRPC 1.7 and its similar commentary, acknowledging the hardship to the defendant from the firm's disqualification, and having noted that one office of the firm represented the bank while a separate office represented the defendant, granted the bank's motion to disqualify the firm. *Id.* at 1040-1042.

Although none of the authority cited by either party is binding on this Court, we found the authority cited by the bank to be more persuasive because it was on point, it invoked a rule

[3] Petitioner also cites *Riggs Nat'l Bank of Washington, DC v Zimmer*, 355 A 2d 709 (Del Ch, 1976), *Moeller v Los Angeles Superior Court*, 16 Cal 4th 1124; 947 P2d 317 (Cal, 1997), and *Martin v Valley Nat'l Bank of Arizona,* 140 FRD 291 (SD NY, 1991) for the proposition that trustees should be treated differently with respect to their respective capacities. However, each of these cases involved the assertion of the attorney-client privilege and work product privilege to avoid discovery; the issue was not whether counsel engaged in a conflict of interest. *Riggs Nat'l Bank of Washington, DC, supra,* 355 A 2d at 711, 713-714, *Moeller, supra,* 16 Cal 4th at 1129, *Martin, supra,* 140 FRD at 317-318. Although the court in *Martin, supra,* 140 FRD at 318-319, noted that the firm would have engaged in a conflict of interest if it had represented both the bank and the trust, the court's comments were not germane to whether the documents were protected by the attorney-client privilege and, thus, were dicta. Furthermore, although several Michigan statutes cited by petitioner recognize the different fiduciary and individual capacities of a trustee, MCL 700.7306, MCL 700.7403, MCL 700.1214, the statutes govern the conduct of the trustee; they do not govern the conduct of a judicial officer, nor do they indicate that a trustee in its fiduciary capacity is any less entitled to loyal representation by legal counsel than other clients in this state.

remarkably similar to MRPC 1.7, and the rule's commentary was very similar. We thus conclude that no distinction should be drawn between a trustee in its fiduciary capacity and a trustee in its individual capacity. Because the parties' interests were directly adverse, disqualification was required absent the consent of both parties, and Bank One did not consent; therefore, the circuit court reached the right result.

Petitioner next argues that her claims should not have been barred by res judicata because the accounts did not disclose material facts. We disagree.

Whether res judicata applies is a question of law subject to de novo review. *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). The probate court granted the bank summary disposition on res judicata grounds with respect to all petitioner's claims that occurred before January 1997 because petitioner failed to file an objection with respect to the bank's accounts.

> "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* at 375-376. [*Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).]

Because the orders settling the accounts involved petitioner and either the bank or its predecessor, the orders involved the same subject matter and parties or parties' privies as the instant case. Thus, the third prong of the res judicata test has been satisfied. An order of a probate court is final and res judicata with respect to its subject matter, *Banks v Billups*, 351 Mich 628, 634; 88 NW2d 255 (1958), and an "allowance of an account is an adjudication of each item of it," *McDannel v Black*, 270 Mich 305, 310, 312; 259 NW 40 (1935). Therefore, the first prong of the res judicata test has been satisfied. With respect to the second prong, our Supreme Court has stated that a settled account is conclusive with respect to the parties absent fraud, mistake, omission or inaccuracy. *Id.* at 635, citing *McDannel, supra* at 311. Thus, if material facts were omitted, res judicata arguably would not apply.

Nevertheless, our Supreme Court has also indicated that "'if the party seeking relief was aware of the facts at the time of the settlement of the account, then the subsequently sought relief will be refused.'" *In re Humphrey Estate*, 141 Mich App 412, 429; 367 NW2d 873 (1985), quoting *McDannel, supra*, 270 Mich at 311-312.[4] Moreover, res judicata has been held to bar claims that the parties failed to raise but could have raised had they used reasonable diligence. *Adair, supra* at 121, citing *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). With respect

[4] This Court's decision in *In re Humphrey Estate*, 141 Mich App 412, 429; 367 NW2d 873 (1985), was made pursuant to MCL 700.564 of the Revised Probate Code, and no similar statute was enacted under EPIC; however, *McDannel v Black*, 270 Mich 305, 310, 312; 259 NW 40 (1935), appears to be based on common law. "Unless displaced by the particular provisions of [EPIC], general principles of law and equity supplement this act's provisions." MCL 700.1203(1).

to diligence, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her. Petitioner admitted that Pearson had held bi-annual shareholder meetings to explain Ervin's financial status, but very few questions were asked.

She also acknowledged that Ervin complied with several valuations of the company, and that one of the valuations indicated that the strategic plan was for moderate growth in sales and research and development for new applications. Moreover, she noted that the trust officer had always attempted to answer her questions. However, she claimed she did not read the reports of the companies she separately hired to valuate Ervin. Petitioner did not demonstrate reasonable diligence where the company and bank clearly cooperated with her requests for information, she did not ask the questions she now complains were unanswered, and she did not read the information she did request. Because she did not exercise reasonable diligence, she failed to raise claims she could have raised, and the court properly dismissed her claims on res judicata grounds. *Adair, supra* at 121, citing *Dart, supra* at 586.[5]

Petitioner next argues that the court erred when it determined that her claims were barred by the statute of limitation pursuant to MCL 700.7307(1) because her claims accrued before EPIC became effective.[6] We agree.

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[5] Andrea argues that res judicata did not apply to her because the fiduciary's accounts did not disclose material facts regarding transactions that affected her interest. Res judicata operates to bar claims with respect to parties and their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003), citing *In re Humphrey Estate, supra*, 141 Mich App at 434. Privity exists when "'the interests of the non-party are presented and protected by the party in the litigation.'" *Peterson Novelties, Inc, supra*, 259 Mich App at 13, quoting *Phinisee v Rogers*, 229 Mich App 547, 553-54; 582 NW2d 852 (1998). Here, because Andrea merely adopts her mother's arguments, she has failed to demonstrate that she had unprotected interests. Therefore, because she is a privy to the instant action and the previously filed accounts, Andrea is likewise barred by res judicata. Moreover, Andrea argues that as a presently vested beneficiary, she was entitled to receive annual accounts, and because she did not receive the accounts, res judicata cannot bar her claims. Although *In re Childress Trust*, 194 Mich App 319, 322-323, 327; 486 NW2d 141 (1992) supports Andrea's claim that she was a presently vested beneficiary entitled to annual accounts under the revised probate code MCL 700.814(4), Andrea was a minor during this time. MCL 700.32 provides in relevant part, "[i]n all proceedings under this act notice to a parent is notice to minor children residing with the parent." And Jane acknowledged receiving annual accounts and financial statements. Therefore, Andrea's claim has no merit under the revised probate code. Under EPIC, a trustee must only furnish an unsolicited annual account to each current beneficiary; the trustee must furnish an account upon request to all other beneficiaries. MCL 700.7303(3)(b). A current beneficiary is one who is "currently eligible to receive income from the trust." *In re Childress Trust, supra*, 194 Mich App at 327. Because Andrea's interest was a presently vested future interest, she was not currently eligible to receive income from the trust and was not entitled to unsolicited annual accounts, and she provided no evidence that she requested annual accounts from the trustee. Therefore, Andrea's claim fails under EPIC as well.

[6] Additionally, Andrea argues that MCL 700.7303 did not bar her petition because MCL (continued…)

Which statute of limitation applied, whether the statute was tolled, and when the limitation period ended are questions of law. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000). Questions of law are reviewed de novo. *Bertrand v Mackinac Island*, 256 Mich App 13, 28; 662 NW2d 77 (2003).

At the time the court made its decision, MCL 700.7307(1) provided:

> Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account.[7]

MCL 700.7307(1) is part of EPIC, MCL 700.1101, *et seq.* 1998 PA 386. Assuming that EPIC applied, petitioner's claim was arguably barred because the last account was filed March 2, 2000, and petitioner did not file her petition for order on supervision and appointment of a successor trustee until August 31, 2001. With respect to the retroactivity of the act, EPIC provides in relevant part:

> (1) This act takes effect April 1, 2000.
>
> (2) Except as provided elsewhere in this act, on this act's effective date, all of the following apply:
>
> * * *
>
> (b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice.
>
> * * *
>
> (d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the

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(…continued)

700.7307 only applies to receipt of accounts and Andrea never received the accounts. Because we agree that MCL 700.7307 did not apply to claims that accrued before EPIC's effective date, we do not reach Andrea's claim.

[7] MCL 700.7307(1) was amended by 2004 PA 314 to read:

> A beneficiary is barred from commencing a proceeding against a trustee for breach of trust if the proceeding is not commenced within 1 year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding. A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by adjudication, consent, ratification, estoppel, or other limitation.

> expiration of a prescribed period of time that commences to run by the provision of a statute before this act's effective date, the provision remains in force with respect to that right. [MCL 700.8101(1), (2)(b), (d).]

Petitioner claims that her rights accrued before April 1, 2000 and, thus, EPIC does not apply pursuant to MCL 700.8101(d). The trustee argues that MCL 700.992 of the revised probate code contained substantially similar language to MCL 700.8101, the Michigan Supreme Court has construed this language to mean that the revised probate code applied to a proceeding begun after its effective date, and EPIC should be construed in the same fashion. Although the Supreme Court in *In re Finlay Estate,* 430 Mich 590, 596-597; 424 NW2d 272 (1988), indeed found that the revised probate code was the applicable law pursuant to MCL 700.992, the case did not involve an issue with respect to the applicable statute of limitation. Nor, for that matter, did this Court's decision in *In re Smith Estate,* 252 Mich App 120; 651 NW2d 153 (2002), involve a statute of limitation issue. Instead, this Court has indicated that statutes of limitation are generally not given retroactive effect. *Gorte v Dep't of Transportationt,* 202 Mich App 161, 167; 507 NW2d 797 (1993).

"[A] statute of limitations may not be applied retroactively to take away vested rights." *Gorte, supra,* 202 Mich App at 168. A statute of limitation operates prospectively "unless an intent to have the statute operate retrospectively clearly and unequivocally appears from the context of the statute itself." *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999), citing *Great Lakes Gas Transmission Co v State Treasurer,* 140 Mich App 635, 650-651; 364 NW2d 773 (1985). The plain language of MCL 700.8101 does not clearly and unequivocally indicate retroactive effect with respect to statutes of limitation. Instead, MCL 700.8101(b) signifies general retroactive effect, while MCL 700.8101(d) excepts acquired rights from EPIC's retroactive application. Thus, MCL 700.7307 did not bar petitioner's claim.

Nevertheless, MCL 700.819 was not the applicable statute of limitation as petitioner argues, because the trustee did not give petitioner "a final account or other statement fully disclosing the matter and showing termination of the trust relationship," which was required to trigger the period of limitation pursuant to MCL 700.819. Instead, this Court has applied the general three-year period of limitation for tort actions to breaches of fiduciary duty. *Miller v Magline, Inc,* 76 Mich App 284, 313; 256 NW2d 761 (1977). See also *Smith v First Nat'l Bank & Trust Co of Sturgis,* 177 Mich App 264, 270; 440 NW2d 915 (1989).[8]

"A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach." *Bay Mills Indian Comm v Michigan,* 244 Mich App 739, 751; 626 NW2d 169 (2001), citing *Baks v Moroun,* 227 Mich App 472, 493-494; 576 NW2d 413 (1998), overruled on other grounds sub nom *Estes v Idea Engineering & Fabricating, Inc,* 250 Mich App 270, 278; 649 NW2d 84 (2002). The "knew or should have known"

[8] See, also, *In re Bentley Trust,* unpublished opinion per curiam of the Court of Appeals, issued August 23, 2002 (Docket No. 228711), 3, *In re Brockway Trust,* unpublished opinion per curiam of the Court of Appeals, issued July 16, 1999 (Docket No. 208504), 3, *In re Barnes Revocable Trust,* unpublished opinion per curiam of the Court of Appeals, issued June 27, 2000 (Docket No. 211968), 3.

language indicates that when a claim accrues is subject to an objective standard. "A plaintiff is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause." *Shawl v Dhital*, 209 Mich App 321, 324-325; 529 NW2d 661 (1995), citing *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993).[9]

Petitioner claims that the trustee fraudulently concealed these events from her by not including the events in the annual accounts, and that this tolled the statute of limitations pursuant to MCL 600.5855. "Generally, for fraudulent concealment to postpone the running of a limitation period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994), citing *Draws v Levin*, 332 Mich 447, 452; 52 NW2d 180 (1952). However, a fiduciary has an affirmative duty to disclose to his principal. *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993). On the other hand, if liability was discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitation. *Witherspoon, supra*, 203 Mich App at 248-249. If a plaintiff knows of a cause of action, there can be no concealment. *Eschenbacher v Hier*, 363 Mich 676, 681; 110 NW2d 731 (1961). With respect to whether a plaintiff is aware of a cause of action, our Supreme Court stated:

> "It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim." [*Eschenbacher, supra*, 363 Mich at 682, quoting 37 CJ, Limitation of Actions, § 359, p 976.]

As previously discussed with respect to res judicata, petitioner was presented with sufficient evidence to place her on notice of the now-challenged events. "A plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore." *Nieves v Bell Industries*, 204 Mich App 459, 465; 517 NW2d 235 (1994), citing *Webb v First of Michigan Corp*, 195 Mich App 470, 475; 491 NW2d 851 (1992). Therefore, the statute was not tolled by MCL 600.5855, and given the abundance of information provided to petitioner, as well as the company's cooperation with respect to investigations performed on behalf of petitioner, we find that all claims that arose more than three years before August 31, 2001 were barred by MCL 600.5805(10).[10] Thus far, petitioner's only claims that have survived res judicata and the statute

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[9] Although *Shawl v Dhital*, 209 Mich App 321; 529 NW2d 561 (1995) involved a medical malpractice action, our Supreme Court, in *Soloway v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 816 (1997), extended the "possible cause of action" standard to other tort claims that were subject to the discovery rule. *Baks, supra*, 227 Mich App at 495 n 10.

[10] Andrea argues that because she did not receive notice of accounts, she was not subject to the period of limitation under MCL 600.5805(10). However, because Andrea was a minor, she did receive notice of the accounts through her mother's notice pursuant to the revised probate code, MCL 700.32, and because she was not a current income beneficiary, she was not entitled to receive automatic, unsolicited notice of the accounts under EPIC, MCL 700.7303(3)(b). (continued…)

of limitation are the Barnsteel transaction, which occurred in January, 1999, and the guaranteed loans that occurred in 2000 and 2001.[11]

Petitioner next argues that the court erred by failing to grant her summary disposition with respect to the bank's self-dealing loans. The court found that the revised probate code did not apply, and the loans were proper under EPIC because they were not made to the trust, they were permitted by MCL 700.7403, MCL 700.7401(2)(q), and MCL 450.1545a, and because Ervin's disinterested directors approved the loans. MCL 700.7403 states:

> (1) If the trustee's duty and the trustee's individual interest or the trustee's interest as a trustee of another trust conflict in the exercise of a trust power, the power may be exercised if any of the following are true:
>
> * * *
>
> (c) The transaction is otherwise permitted by statute.

MCL 700.7401 provides in relevant part:

> (1) A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries' best interest.
>
> (2) Subject to the standards described in subsection (1) and except as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:
>
> * * *
>
> (q) To borrow money for any purpose from the trustee or others and to mortgage or pledge trust property.

(…continued)

Therefore, any claims that were barred to her mother were also barred to her pursuant to MCL 700.32. And under EPIC, because she did not request the annual accounts, she sat on her rights. Any claim that did not fall within the three-year period before she filed her concurrence with Jane's petition should have been barred by MCL 600.5805(10) because she should have discovered the alleged breach. *Bay Mills Indian Comm, supra,* 244 Mich App at 751, citing *Baks, supra,* 227 Mich App at 493-494.

[11] Petitioner argues that the trial court improperly granted summary disposition to the bank on all her claims where several of her claims were not raised in the bank's motion for summary disposition but were raised in the bank's draft order that the court signed. Petitioner has not cited a single case to support her argument. An appellant may not merely announce his position without providing authority to support his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). We decline to review this issue.

Thus, assuming that the trust agreement did not prohibit the bank from lending money to Ervin, the bank had the power to do so if the loan was reasonable and prudent. The trust authorized the bank to borrow money on behalf of the trust and to exercise the same control over the property as the settlor might if living. Importantly, the trust did not preclude the bank from lending money to Ervin. Moreover, MCL 450.1545a(1) provides in relevant part:

> A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:
>
> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee or independent director or directors authorized, approved, or ratified the transaction.

An affidavit by Maretta indicated that besides himself, Ervin's board of directors consisted of members of Ervin's management James Stephenson, John Pearson, Lynn Rogers, and outside directors Amherst H. Turner and Richard Sarns. Maretta also stated:

> 8. Ervin obtains competitive bids from multiple financial institutions before it enters into any loan transaction with any lender.
>
> 9. Neither I nor any other member of Bank One (i.e. Bank One Trust Company, N.A.) has had any involvement in the decision by any Bank One affiliate to make any loan to Ervin. The terms and conditions of these loans were negotiated entirely between the Bank One affiliates and Ervin without my involvement or the involvement of other members of our trust group.
>
> 10. In each circumstance where a Bank One affiliate was a lender to Ervin, the loan from the Bank One affiliate was on terms that were much more favorable to Ervin than those offered by any other lender. At no time did Ervin enter into any loan with a Bank One affiliate as an inducement to, or reward for, any action by Bank One as trustee.

Similar statements were made by Richard Cohn, who was the Vice-President, Secretary, and Treasurer of Ervin. The practice of obtaining competitive bids and the fact that the trust group did not participate in the loan negotiations indicated that the loan transactions between the bank and Ervin were fair. Moreover, a consent resolution signed by all members of the board of directors indicated that the material facts of all transactions and the bank's interests were known by all directors, and the directors approved the loans because they were fair and in Ervin's best interest. Therefore, the interested loans were authorized by statute on two separate grounds. MCL 450.1545a(1)(a), (b). We disagree with petitioner's contention that MCL 450.1545a does not apply to trustees. Our Supreme Court in *In re Butterfield Estate*, 418 Mich 241, 257; 341 NW2d 453 (1983), noted that when trustees serve as corporate directors, it is necessary to

consult both the law of corporations and the law of trusts to determine the trustees' duties to the creditors, shareholders, and beneficiaries.

Petitioner further argues that while MCL 700.7401(2)(q) gives a trustee the power to borrow money from itself, the power can only be exercised within the confines of MCL 700.1214. MCL 700.1214 provides:

> Unless the governing instrument expressly authorizes such a transaction or investment . . . a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents . . . . A fiduciary's deposit of money in a bank or trust company, in which the fiduciary is interested as an officer, director, or stockholder, does not constitute a violation of this section.

Notably, MCL 700.1214 does not contain an exclusion like MCL 700.7403, "otherwise permitted by statute." Thus, there appears to be some conflict between MCL 700.7401(2)(q), which authorizes a trustee to lend money to the trust, and MCL 700.1214, which appears to strictly prohibit self-dealing. Apparent inconsistencies between statutes should be reconciled if possible. *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). Statutes relating to the same subject are in pari materia and must be read collectively as one law. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

When interpreting statutes, the goal is to discover and give effect to legislative intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). To determine intent, appellate courts first look at the specific language of the statute. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). Unless defined in the statute, every word should be accorded its ordinary meaning given the context in which the word is used. *Lee v Robinson*, 261 Mich App 406, 409; 681 NW2d 676 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). MCL 700.1214 does not specifically address loans; in fact, the only word that could potentially refer to a loan is the word "transaction." However, transaction is used in conjunction with the word investment, "transaction or investment."

Although "or" is a disjunctive term, *Auto-Owners Ins v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997), it is also "used to connect alternative terms for the same thing" and "used to correct or rephrase what was previously said." *Random House Webster's College Dictionary* (2001). In this context, the word transaction is synonymous with investment. MCL 487.14405 refers a fiduciary bank's investment of trust property, and MCL 700.1214 prohibits the fiduciary from (a) engaging in a transaction with the estate, (b) investing estate money in an affiliate of the fiduciary or (c) making a profit by purchasing, selling, or transferring estate property. Although the word transaction certainly could encompass a loan, the context of the statute indicates that the term transaction should be more narrowly construed.

Without this construction, the statutes cannot be harmonized; petitioner's interpretation disregards the provision in MCL 700.7403(c), which authorizes the transaction if otherwise permitted by statute. When the conflict cannot be harmonized, the specific statute controls. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). Here, MCL 700.7401(2)(q) specifically grants a trustee the power to make a loan to the trust. This provision

is more specific than MCL 700.1214, which prohibits transactions or investments by fiduciaries in general. Moreover, MCL 700.7401(2)(q) is listed under the portion of EPIC specifically dealing with trusts, MCL 700.7201, *et seq.*, while MCL 700.1214 is listed under the construction and general provisions portion of EPIC, MCL 700.1201, *et seq.* Therefore, because the more specific statute controls, the loans by the bank to Ervin were not prohibited under EPIC. Petitioner's claims with respect to the guaranteed loans all involved transactions occurring in 2000 and 2001; petitioner's evidence indicated that she did not receive notice of these loans until March 29, 2002. Therefore, petitioner's claims did not accrue until after EPIC's effective date of April 1, 2000, and the claims were barred. MCL 700.8101(1), (2)(b).

Petitioner next argues that Bank One and Bank One Trust Company did not comply with the requirements of MCL 487.14402; because they did not comply, neither Bank One nor Bank One Trust Company was the proper trustee; and the court erroneously denied her summary disposition with respect to this issue. We disagree.

As a current income beneficiary of a testamentary trust, petitioner was entitled to notice of substitution sent by certified mail, which explained her right to object. In her affidavit, petitioner claimed she did not receive this notice. If the affidavit had been the only evidence admitted, it arguably would have been sufficient to support granting summary disposition to petitioner on this ground. Nevertheless, petitioner's deposition testimony contradicted the affidavit, and the deposition testimony controlled. In her deposition, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her interests. Because petitioner's deposition testimony clearly indicated that she did not remember one way or the other whether she received notice from the bank, and she stated numerous times throughout the deposition that she did not read information provided to her, the deposition testimony contradicted petitioner's statement in her affidavit. And an affidavit may not be used to create an issue of material fact by contradicting damaging deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 478-480; 633 NW2d 440 (2001).

Because this issue was raised in petitioner's motion for summary disposition, petitioner had the initial burden of supporting her position with admissible evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Petitioner did not meet this burden. If the nonmoving party is entitled to summary disposition, the court may grant it to the nonmoving party. MCR 2.116(I)(2). Maretta asserted in his affidavit that he sent petitioner statutorily sufficient notice of the substitution and her right to object. Because petitioner did not meet the initial burden, and the bank provided evidence that it complied with the requirements of MCL 487.14402, summary disposition was appropriately grated to the bank. *Dykes, supra,* at 478-479.

Petitioner's sole remaining claim to survive summary disposition on statute of limitation and res judicata grounds is with respect to the Barnsteel acquisition. Petitioner claims the bank had a conflict of interest because it was a lender for the Barnsteel transaction, and the analysis performed by the bank showed numerous risks involved with the purchase, none of which were disclosed to the beneficiaries. The documents presented by petitioner to support her claim appear to be internal company documents evaluating Barnsteel's strengths and weaknesses, evaluating the positives and negatives of the proposed acquisition, and establishing a maximum price Ervin was willing to pay for the business. One of the reasons in support of the purchase

was to protect or increase Ervin's market share. We find that protection of market share was a prudent reason for the investment.

Had petitioner presented evidence indicating that the investment was not prudent, an issue of material fact would have existed requiring a trial on this issue. However, petitioner did not provide any affidavits from financial or business experts indicating that the investment was imprudent at the time it was made. Moreover, this was evidence petitioner could have presented, which did not rely on the completion of discovery. "[A]n adverse inference may be drawn against a party who fails to produce evidence within its control." *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989), citing *Griggs v Saginaw & F R Co*, 196 Mich 258, 265-266; 162 NW 960 (1917).

If the opposing party is entitled to judgment, the court may render judgment in its favor. *Auto-Owners Ins v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). De novo review requires this Court to review the evidence in the same manner as the trial court to determine whether an issue of material fact existed. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). The bank argued in its reply brief to petitioner's motion for summary disposition that it had acted prudently and had not breached its fiduciary duties. Therefore, the issue was before the trial court. Although failure to raise an issue of material fact was not the ground on which the trial court granted summary disposition – the trial court granted summary disposition on statute of limitations grounds pursuant to MCL 700.7307(1) – a decision that reaches the right result for the wrong reason will not be reversed on appeal. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

Because petitioner's petition was properly dismissed in its entirety, we need not reach petitioner's argument that a trustee is liable for assets held outside the trust.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens